Filed 12/17/08 Lee v. Lee CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

YUNMI LEE, Plaintiff and Respondent, v. BYUNGMOO LEE, Defendant and Appellant.	B202451 (Los Angeles County Super. Ct. No. BC340299)

APPEAL from a judgment of the Superior Court for Los Angeles County, Kenji Machida, Judge. Affirmed.

Ford, Walker, Haggerty & Behar, Maxine J. Lebowitz and Jason Friedman for Defendant and Appellant.

Law Offices of J. Grant Kennedy and J. Grant Kennedy for Plaintiff and Respondent.

Defendant Byungmoo Lee, D.D.S. appeals from a judgment in favor of plaintiff Yunmi Lee following a jury trial on plaintiff's claim for dental malpractice. Dr. Lee asserts there was insufficient evidence to find him vicariously liable for the negligence of the dentist who performed the procedure that caused the injury to plaintiff. We affirm the judgment.

BACKGROUND

In 2004, plaintiff's regular dentist, Dr. Bum Soo Kim, recommended that plaintiff get dental implants for two teeth on her lower left jaw. Dr. Kim referred plaintiff to Dr. Lee for the implants. Before she met with Dr. Lee, plaintiff had a CT scan taken of her jaw, and the results were sent to Dr. Lee. Because Dr. Lee does not place implants himself (he is a prosthodontist specialist, i.e., he makes dentures, crowns, and restorations), he gave the results to Dr. Kian Kar, who specializes in gum surgery, including placing implants.[1] Dr. Lee asked Dr. Kar to review the results to determine if plaintiff was an appropriate candidate for the implants. Dr. Kar determined that she was.

Shortly thereafter, plaintiff went to Dr. Lee's office for her initial consultation regarding the implants. The only name on the door to the office was Dr. Lee's. Dr. Lee explained the implant procedure to her and told her how much the procedure would cost. Plaintiff went back to Dr. Lee's office for the surgery a month later. At that time, Dr. Lee introduced plaintiff to Dr. Kar, who performed the surgery in Dr. Lee's office, using Dr. Lee's equipment, including implant devices supplied by Dr. Lee, and being assisted by Dr. Lee's staff. Plaintiff paid Dr. Lee for the procedure.

---

[1] Dr. Kar had a practice in Laguna Niguel at the time of the consultation. Dr. Lee practiced in Los Angeles.

Plaintiff returned to Dr. Lee's office the following week to have her sutures removed. She told Dr. Lee that she was having pain in her lower left quadrant. She went back the next day (and again two days later) to see Dr. Kar, told him she was in a lot of pain and asked that one of the implants be removed. Apparently, she had consulted with another dentist and had a CT scan taken, and was told that one of the implants was pressuring the nerve running down her jaw. Although the implant ultimately was removed, plaintiff's pain persisted and was so intense it significantly interfered with her life.

Plaintiff filed the instant lawsuit for dental malpractice against Dr. Lee and Dr. Kar.[2] The matter was tried before a jury, which found that Dr. Kar was negligent but Dr. Lee was not. However, the jury found that Dr. Kar was an agent of Dr. Lee.[3] The jury found that plaintiff sustained the following damages: $50,000 for past pain and suffering; $250,000 for future pain and suffering; $1,000 for past medical costs; $198,000 for future medical costs; $118,572 for past loss of earnings; and $2,055,504 (with a present value of $1,099,951) for future lost earnings. After computing the present value of the award for future medical costs, the trial court concluded that plaintiff was entitled to judgment of $1,655,758 against Dr. Kar and Dr. Lee, jointly and severally. Following the verdict, but before entry of judgment, Dr. Kar settled with plaintiff, paying her $1,500,000.

---

[2] Plaintiff's husband, Hong Kyu Lee, also was a plaintiff in the original complaint, although he apparently dismissed his claim for loss of consortium (there is no dismissal in the record). Yunmi Lee was the only plaintiff identified at trial.

[3] In response to a question on the special verdict form regarding contributory negligence, the jury attributed none of the fault to plaintiff, but attributed 10 percent of the fault to Dr. Lee. Because the jury had found in response to earlier questions that Dr. Lee was not negligent in the dental diagnosis and/or treatment of plaintiff, the trial court ruled that no fault would be allocated to Dr. Lee.

The parties stipulated that the settlement amount would be credited against the verdict, leaving a balance of $155,758. Therefore, judgment was entered against Dr. Lee in the amount of $155,758, plus costs in the amount of $3,277.11.

Dr. Lee moved for a new trial and for judgment notwithstanding the verdict, both of which were denied. He timely filed a notice of appeal from the judgment and order denying his post-trial motions.

DISCUSSION

Dr. Lee challenges the finding of vicarious liability on appeal. He argues he cannot be liable under a partnership or joint venture liability theory because there was no evidence that he and Dr. Kar shared profits and losses. (Citing *Chambers v. Kay* (2002) 29 Cal.4th 142, 151 ["Generally, a partnership connotes co-ownership in partnership property, with a sharing in the profits and losses of a continuing business"] and *Bank of California v. Connolly* (1973) 36 Cal.App.3d 350, 364 ["A joint venture exists where there is an 'agreement between the parties under which they have a community of interest, that is, a joint interest, in a common business undertaking, an understanding as to the sharing of profits and losses, and a right of joint control'"].) Although Dr. Lee concedes there was testimony that Dr. Lee and Dr. Kar split the payments received by Dr. Lee from implant patients after first deducting the cost of the implant devices,[4] he contends this does not constitute a sharing of profits and losses because no deductions were made for Dr. Lee's office expenses. He also argues he cannot be liable under an

---

[4] Dr. Kar testified that when a patient (or insurer) paid Dr. Lee for an implant, Dr. Lee deducted the cost of the implant device (Dr. Lee kept a supply of implant devices in his office) and determined the amount owed to Dr. Kar. At the end of each month, Dr. Lee would pay Dr. Kar the amount owed and provide him with a 1099 form for tax purposes. Dr. Lee testified at his deposition, which was read to the jury, that he "give[s Dr. Kar] 50 percent of the collection."

ostensible agency theory because there was no evidence that plaintiff believed Dr. Kar was Dr. Lee's agent; in fact, plaintiff testified that she understood that Dr. Lee "lent" his office to Dr. Kar for the implant surgery.

We need not determine whether there was sufficient evidence to support a finding that Dr. Lee and Dr. Kar were engaged in a partnership or joint venture because there clearly was sufficient evidence to support a finding that Dr. Kar was Dr. Lee's ostensible agent. "Ostensible agency . . . '"may be implied from the facts of a particular case, and if a principal by his acts has led others to believe that he has conferred authority upon an agent, he cannot be heard to assert, as against third parties who have relied thereon in good faith, that he did not intend to confer such power. . . ."' [Citation.]" (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 502 (*Ermoian*).) In *Ermoian*, the appellate court examined several cases involving lawsuits seeking to hold a hospital vicariously liable for the negligence of independent contractor physicians who provided services at the hospital, to determine the elements that must be proved to establish ostensible agency in the medical context. The court found there was consistency among the cases as to those elements, and described them as follows: "(1) the service of the physician is performed on what appears to be the hospital's premises; (2) a reasonable person in plaintiff's position would believe that the physician's services are part and parcel of services provided by a hospital; and (3) the hospital does nothing to dispel this belief." (*Id.* at p. 505.) The court also noted that "a plaintiff seeking to prove that a physician is an ostensible agent of a hospital is not required to show that the patient (1) actually believed that the doctors were employed by the hospital, or (2) changed her position or otherwise relied to her detriment based upon her belief that the doctors were agents of the hospital." (*Ibid.*) In other words, in these circumstances, the patient's belief is presumed in the absence of

evidence that the patient had reason to know the physician was not the hospital's agent. (*Ibid.*)

Although in this case plaintiff sought to hold Dr. Lee, rather than a hospital, vicariously liable under an ostensible agency theory, we believe the elements described in *Ermoian* apply here. As explained in one of the earlier cases examined by the court in *Ermoian*, the reason a patient is not required to show he or she actually believed that the negligent doctor was employed by the hospital in order to establish ostensible authority is because hospitals generally hold themselves out to the public as providers of care, and thus "it is commonly believed that hospitals are the actual providers of care . . . whenever someone seeks treatment at a hospital." (*Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1456; accord, *Ermoian*, *supra*, 152 Cal.App.4th at p. 505.) Here, substantial evidence demonstrates that Dr. Lee holds himself out as a provider of dental implants: both plaintiff and Dr. Lee testified that plaintiff was referred to *Dr. Lee* for the implants, Dr. Lee and Dr. Kar testified that Dr. Lee maintains a supply of implant devices in his office and that patients (including plaintiff) or their insurers usually pay *Dr. Lee* for the implants, and Dr. Lee testified that he maintained all of the medical records related to the implant procedures in his office.

Having concluded the elements described in *Ermoian*, *supra*, 152 Cal.App.4th 475, apply here, we review the jury's finding of agency under the substantial evidence standard of review. Under that standard of review, "[a]ll conflicts in the evidence are resolved in favor of the prevailing party, and all reasonable inferences are drawn in a manner that upholds the verdict." (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445.) "[O]ur review begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the [jury's] factual

determinations." (*Ermoian, supra,* 152 Cal.App.4th at p. 501.) We hold substantial evidence supports the jury's finding.

First, there is no dispute that Dr. Kar conducted the surgery on plaintiff in Dr. Lee's office. Dr. Lee also testified that his is the only name on the door to his office. Thus, the first element -- i.e., "the service of the physician is performed on what appears to be the [principal's] premises" (*Ermoian, supra,* 152 Cal.App.4th at p. 505) -- is satisfied.

Second, there was evidence presented from which a jury reasonably could conclude that "a reasonable person in the plaintiff's position would believe that [Dr. Kar's] services are part and parcel of services provided by [Dr. Lee]." (*Ermoian, supra,* 152 Cal.App.4th at p. 505.) As noted above, plaintiff's dentist referred her to Dr. Lee for the implants and she paid Dr. Lee for the surgery to place the implants. Dr. Kar used Dr. Lee's equipment and was assisted by Dr. Lee's staff in performing the surgery, and Dr. Lee's office provided all of the administrative support regarding the surgery.

Finally, Dr. Lee did "nothing to dispel this belief." (*Ermoian, supra,* 152 Cal.App.4th at p. 505.) Dr. Lee admitted that he did not give plaintiff any documents to inform her that Dr. Kar was not part of his office, and that he simply introduced plaintiff to Dr. Kar and told her that Dr. Kar would perform the implant surgery. There was no evidence presented that Dr. Lee (or Dr. Kar) said anything to plaintiff before the surgery to indicate that Dr. Kar was an independent contractor. Although Dr. Lee argues that plaintiff knew that Dr. Kar was not Dr. Lee's agent because she testified she understood that Dr. Lee "lent" his office to Dr. Kar to perform the surgery, that testimony does not inexorably lead to the conclusion that she did not in fact believe that Dr. Kar was Dr. Lee's agent at the relevant time. The question put to plaintiff asked about her *current* understanding, not her understanding at the time she had the implant surgery: Dr. Lee's counsel

asked, "It is your understanding that my client, Dr. Lee, lent his office to Dr. Kian Kar for the implant operation; true?" Plaintiff answered, "Yes." The jury reasonably could conclude that her response was limited to her understanding of the relationship at the time of trial, more than two years after the surgery was performed. In short, substantial evidence supports the jury's implied finding that Dr. Lee did nothing to dispel plaintiff's presumed belief that Dr. Kar was his agent.

DISPOSITION

The judgment is affirmed. Plaintiff shall recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.